IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING IN PITTSBURGH

MAR 30 2012

DEFENDANTS BRIEF IN OPPOSITION TO APPELLATE COUNSELS PETITION FOR LEAVE TO WITHDRAW

Commonwealth v. Fowler, 1787 WDA 2011

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IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING IN PITTSBURGH

COMMONWEALTH OF PENNSYLVANIA V.	:	
TERRENCE FOWLER	:	1787 WDA 2011
	:	

DEFENDANTS BRIEF IN OPPOSITION
TO APPELLATE COUNSELS PETITION TO WITHDRAW

NOW THIS day of March, 2012 defendant comes with his, Pro Se brief in **opposition to counsels petition for leave to withdraw** as counsel for the defendant, and states the following in support thereof:

1. After a two day trial, defendant was convicted, after a jury found him guilty, and the lower court sentenced him to the following:

- Attempted Homicide, 240-480 months of incarceration;
- Robbery, 90-180 months incarceration **consecutive** to the sentence for Attempted Homicide;
- Conspiracy to Robbery, 84-168 months **concurrent** with the sentence for Robbery;
- Possess Instr. of Crime, 10-60 months **concurrent** wityh the sentence for Robbery.

2. Your defendant request this Honorable Court **deny** appellate counsels petition for leave to withdraw as he believes those issues raised in his direct appeal, if **properly** represented **do have**, **argundo**, merit, which warrants further review by this Court.

3. Before defendant highlight **some** of the issues in his appeal he believes **do have** arguable merit, he will address counsels

Petition for leave to withdraw.

4. In counsels petition, at number 4, she states she has complied with the **technical mandates of Anders** by: 1) providing defendant with a copy of the **Anders** petition and brief, 2) advising defendant of the right to retain new counsel, 3) that defendant can proceed pro se, or raise any additional points worthy of this Courts attention.

5. It should be emphasized that **lack of merit** in an appeal **is not** the legal equivalent of frivolity. **Anders** appears to rest **narrowly** on the distinction between complete **frivolity** and **absence** of merit. The latter is **not enough** to support either a request by counsel to withdraw, **nor** the granting of such a request by the Court. Commonwealth v. Kearns, 896 A.2d 640 at P.5.

6. Pennsylvania's system of appellate review is based upon the notion that an adversarial process will best advance the interest of the parties and that development of the law. Upon this Court's re-examination of counsel's **Anders** brief, it should conclude, although counsel had followed the **technical requirements** necessary to withdraw under **Anders**, it should disagree, therefore, that defendant's appeal is **wholly frivolous**.

7. To the contrary, the Court should conclude that the issues argued in counsels **Anders** brief was, upon it's face, of arguable merit and deserved the **full** attention of an **advocates brief**.

Thus, this Court should **order** counsel to file an **advocates brief** in ~~defendants~~ behalf of the defendant. Accord, Commwlth. v. Kearns, 2006 PA Super. 75 896 A.2d 640 (Pa. Super. 2006) (Kearns I).

In further support hereto defendant submits the following:

8. In review of **Anders** requirements, defense counsel has two choices when representing an indigent clients appeal:

- She/he can either prosecute the appeal, in which she/he will be expected to perform as a **spirited advocate** on the clients behalf;
- Or counsel may choose to withdraw her/his services.

9. If counsel finds her case to be "wholly frivolous," after a **conscientious** examination of it, she should so advise the Court and request permission to withdraw.

That being done, on the other hand, if it finds **any** of the legal points arguable on the merits, and therefore **not** frivolous, she must, **prior to decision to withdraw**, afford the indigent defendant the assistance of counsel to argue the appeal.

RIGHT TO WITHDRAW

1). The right to withdraw as counsel is in the first instance teid to a finding, **after** a conscientious review of the record, that the appeal is "wholly frivolous."

2. When defense counsel seeks to withdraw at the appellant stage, **Anders** requires that counsel's brief should refer to **anything in the record** that **might** arguably support the appeal.

Defendant believe's there were several issue's of arguable merit for which an **advocate's brief** might follow; i.e., Commonwealth's witnesses un-reliability in his identification of the defendant **or** his alleged co-defendant; the victim's in-ability to identify the men he say's robbed and shot him; the lack of discovered evidence linking defendant to the robbery (where **no evidence** was recovered from defendants person, or his home, after police search); the fact that the defendant was sentenced to **possession of instrument of crime**, even though no such "instrument" was ever recovered (creating a form of **Intra-case collateral estoppel**); the lower Court sentencing defendant to the statutory maximum; the lower court's violation of the merger doctrine, when it failed to merge Attempted Murder conviction **into** the Aggravated Assualt conviction, in violation of § 109 and §110 (merger) (Campana I); the lower Court's error in it's Jury instructions, where the Jury found defendant guilty and the Court sentenced, defendant on a **lesser included offense** (conspiracy, where defendant's alleged co-defendant was dismissed as participant in any crime relating to defendants conviction).

3. Where an accused is entitled to a **counseled** appellate review, that right should **not** be denied **or** diminished solely because of indigency. The end is achieved by **requiring** counsel to conduct an **exhaustive examination of the entire record** and by also placing the responsibility **on the reviewing Court to make an independent determination of the merits of the appeal.**

4. Once an appellate Court is satisfied with the accuracy of counsel's assessment of the appeal as being "wholly frivolous," counsel has fully discharged her/his responsibility.

The role of an **advocate**, insisted upon in **Anders**, refers to the manner in which the record was examined **in an effort to uncover grounds to "support" an appeal.** Where counsel has in **good faith** satisfied that obligation and found the appeal to be wholly frivolous, she/he can do no more.

5. In **Anders** the United States Supreme Court addressed the quality of representation to which an indigent criminal defendant was entitled in an appeal of right. The Court was concerned that the **quality** of representation should **not be undermined** because of his impecunious state.

> [495 Pa. 470] "[T]his Court has consistently held **invalid** those procedures 'where the rich man, who has appeals as of right, enjoys the benefit of counsel's examination into the record, research of law, and marshalling of arguments on his behalf, while indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.' [citations omitted.] **ID.** at 741, 87 S. Ct. at 1398.

That Court concluded that equality of representation **could only** be assured "where counsel acts in the role of an **advocate** in behalf of her/his client, as opposed to that of **amicus curiae.**" **ID.** at 744, 87 S. Ct. at 1400.

For the foregoing, it is apparent that the right to withdraw is in the first interest a finding, after a conscientious review of the record, that the appeal is wholly frivolous. That same Court also noted that **"lack of merit in an appeal is not the legal equivalent of frivolity."** Commonwealth v. Greer, 455 Pa. 106, 108, 314 A.2d 513, 514 (1974).

6. The only remaining question left to be considered before the Court can rule of appellate counsel's petition for leave to withdraw is whether the brief prepared by counsel satisfies the mandate of **Anders.** [495 Pa. 472] **Anders** requires that counsel's brief should refer to **anything in the record that might arguably support the appeal. Anders v. California,** 386 U.S. at 744, 87 S. Ct. at 1400. The question of the sufficiency of counsel's brief has been a subject of concern in this jurisdiction. See e.g., Commonwealth v. Collier, 489 Pa. 29, 413 A.2d 681 (1980); Commonwealth v. Perry, 464 Pa. 272, 346 A.2d 554 (1975).

> ...By the same token, counsel is **not** required to **compromise** principle or **act** contrary to his clients interest or own conscience. Hence, if after a conscientious study of the case he concludes an appeal from the judgment imposed on his client is **totally** without merit and would be wholly frivolous, he should so advise the Court and ask permission to withdraw as counsel in the case. But before he may withdraw he must, inter alia, file a brief referring to **anything** in the record 'that **might** arguably support the appeal.'

It is in this respect that counsel here **failed** in her responsibility. In her brief, after a recitation of the facts and pertinent law, counsel in a conscientious effort to be honest with this Court, then proceeded to **demonstrate by reference** to the record **why** the instant appeal is meritless. This counsel **may not do.** Just as counsel **may not** assume the role of **amicus curiae** when she represents a client, so too, when counsel seek's to withdraw, she **may not** assume that role when presenting to the Court **anything** that **might** arguably support an appeal. Defendant repeats, "counsel's role is **not that of amicus curiae.**" Commonwealth v. Perry, Supra, 464 Pa. at 275-76, 346 A.2d 554.

7. The dilemma created by the Perry reasoning becomes apparent when the Court considers the definition of the term "wholly frivolous" adopted in this jurisdiction. Commonwealth v. Greer, Supra. If the Greer definition of definition of "wholly frivolous" means that there are no points present that "might arguably support an appeal" counsel is saddled with an impossible burden, if he is nevertheless required to file a brief containing arguments that are nonexistent. If on the other hand, there are claims of arguable merit, **even though counsel may not have confidence in them,** under Greer the appeal is **not** wholly frivolous and counsel **is not** entitled to seek leave to withdraw. Commonwealth v. Greer, Supra. Thus, following the Perry rationale to its logical conclusion the right of counsel to seek withdraw **would be illusory.** Defendant does not believe that such a result was ever intended by the United States Supreme Court.

The core of the **Anders'** reasoning is that where an accused is entitled to a counseled appellant review, that right should **not be denied** or diminished solely because of indigency.
What presents the problem here, is that the counsel's brief **does not** appear to meet the standards set by Commonwealth v. Collier, supra, and Commonwealth v. Perry, supra. These cases would seem to suggest that counsel's statements in the brief as to **why** the arguments were "wholly lacking" in merit evidenced counsel's failure to assume the role of an **advocate.** At the same time, counsel's right to withdraw is depended upon his certification that she/he **fully** studied the record and found no merit in the appeal.
As stated earlier, defendant does not believe counsel has done that.

8. The Court, in the instant matter, should consider that Constitutional mandated procedure for withdraw of counsel as set forth by the Supreme Court of the United States. **Anders,** supra. Counsel claims that she has met the requirements of **Anders** because she 1) requested to withdraw, 2) filed a brief, 3) furnished defendant with a copy, 4) advised him of his right to retain new counsel or proceed in propria persona. Such actions, by counsel, completely ignores the spirit of **Anders,** which detailed what counsel is required to do before the [495 A.2d 475] Court makes an independent judgment regarding the merit(s) of the appeal.

9. An evaluation of the brief submitted in the instant case **purporting** to comply with **Anders** must be made **before** the Court

Undertakes an independent evaluation. If the brief filed is inadequate, the indigent defendant **had not** received the diligent and effective representation which is required by **Anders.** The Court was careful to point out that the **Anders** Court concluded that "equality of representation could **only** be assured 'where counsel **acts in the role of an advocate** in behalf of his client, as **opposed** to that of **amicus curiae.'"** Court'swhow merely allow appellate counsel's to withdraw **before** assuring the spirit of **Anders** has been met amounts to merely playing lip service to the precept of **quality legal representation** for those without financial resources.

10. A common thread running through the **Anders** opinion is the Supreme Court's denunciation of counsel's representation in the role of **amicus curiae.** In part I of the opinion, the Court described the precedent that provide the basis of the **Anders** decision and specifically reiterated that counsel's representation "must be in the role of an **advocate.** Ellis v. Untied States, 356 U.S. 674, 675, 78 S. Ct. 974, 975, 2 L.Ed. 2d 1060 (1958), rather than as **amicus curiae." Anders** v. California, supra 386 U.S. at 741, 87 S.Ct. at 1399. In part II of the opinion, when discussing the particular procedure that had been utilized in **Anders'** case, the Court **rejected** the procedure because counsel did **not act** "in any greater capacity than merely as **amicus curiae** which was condemed in Ellis supra." **Id.** 386 U.S. at 743, 87 S.Ct. at 1399. Finally, in part III of the opinion, the Supreme Court began its directive to court-appointed counsel who wish to withdraw with the **unequivocal**

Declaration that "[t]he Constitutional requirement of substantial **equality** and fair process can **only** be attained where counsel acts in the role of an **advocate** in behalf of his client as **opposed to that of amicus curiae." Id.** at 744, 87 S.Ct. 1100.

11. This Court's conclusion that the role of an advocate insisted upon in **Anders** refers to the manner in which the record was examined is simply incorrect. If the **Anders** Court has been solely concerned with counsel's review of the record, there would have been no need to reject the "no merit letter" utilized by **Anders'** attorney, for the Court could have verified counsel's conclusions by it's own review of the record. Rather, the **Anders** Court was concerned with what counsel submitted to the Court that might verify counsel's examination of the record and aid the in conducting its independent evaluation of the case. At the same time the Court in **Anders** expressed its concerns that counsel **not brief his case "against" his client.**

Unfortunately, in the instant case, counsel did indeed **do more,** in the form of argument **against her client.** Counsel should have limited her brief to a statement of the facts with citations to the transcript(s) and discussion of the legal issues involved in the case with citations of authority.

Instead, counsel for the defendant, merely went on to explain what evidence the Commonwealth's witnesses saw, what they did and what defendant **did not** bring attention to that would justify his requested relief...that this was done, so he could not expect to gain that requested relief. Counsel furthered her explaination

By describing how the evidence was sufficient to sustain the verdict, and why the Court did not abuse its discretion in sentencing and further cited precedent (albeit insufficiently) upon which this Court could base a finding that defendant's claims lacked merit or was otherwise "wholly frivolous."

12. In answering each point raised, counsel sought to show this Court **why each issue would fail.** Such representation **does not** constitute the **effective** assistance of counsel required by **Anders** and adopted by this Court in Commonwealth v. Collier, 489 Pa. 26, 413 A.2d 680 (1980) and Commonwealth v. Perry, 464 Pa. 272, 346 A.2d 554 (1975).

Defendant, through his own research, has noticed that this Court has **emphatically** enforced and reiterated the **Anders** requirement of **spirited advocacy** by court-appointed counsel. Since Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968), the Court has **deplored** and **rejected** the submission of a brief **purporting** to comply with **Anders** which "effectively amounts to an argument in **support** of affirmance." Commonwealth v. Greer, 455 Pa. 106, 110, 314 A.2d 513, 515 (1974), citing Commonwealth v. Baker, supra.

13. As the brief submitted in the instant case **fails** to comply with **Anders** v. California, supra, defendant respectfully request that this Court **deny** appellate counsel's petition for leave to withdraw, and further order that counsel amend her brief in a manner consistent with an **advocates** brief. Consulting with the defendant

Before its submission, to ensure that the contents are exceptable and represents the **clients wishes.**

CONCLUSION

"[A]ppointed counsel is of course not required to accept a client's view by asserting points of view her good conscience would reject even at the loss of a handsome fee. At the same time, counsel **cannot** file a claim **against her client.** It is one thing for defendant to be told that appointed counsel see's no way to help him, quite another for him to be **sandbagged** when the counsel appointed by the arm of the Government seems to be **helping** another to seal his doom." Suggs v. United States, 391 F.2d 971 (D.C. Cir. 1968); accord, Commonwealth v. Jones, 451 Pa. 69, 301 A.2d 811 (1973). Defendant is forced to rely on his own research in this case and 'try' to develop his arguments such as the sufficiency of evidence and the violation of the merger doctrine (as it relates to his sentences for attempted murder and aggravated assault), and other **exculpatory** evidence (not used) that would have been entered, correctly, as rebuttal of the polices' testimony, concerning what was or was not found at his residence, and how, if at all, those items related to his guilt or innocence.

Again, defendant respectfully request that this Honorable Court **deny** counsel's request to withdraw and issue order that counsel file an **advocates** brief detailing the defenses, but not limited hereto, raised herein.

That if this Court believe's defendant can not or will not be properly represented by current counsel, taking into account

Counsel's petition for leave to withdraw, then assign new counsel, giving that **new counsel** ample time to get up to speed so that defendant can receive the proper effective assistance of counsel.

RESPECTFULLY SUBMITTED:

Dated: March 26, 2012

TERRANCE FOWLER
Defendant, Pro Se.
SCI-Smithfield, P.O. BOX 999
Huntingdon, PA 16652

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING IN PITTSBURGH

COMMONWEALTH OF PENNSYLVANIA :

V. : 1787 WDA 2012

TERRANCE FOWLER :

CERTIFICATE OF SERVICE

I, defendant, Terrance Fowler, do hereby certify that defendants foregoing: **Brief In Opposition To Appellate Counsels Petition For Leave To Withdraw**, has served a true/correct copy of the above mentioned document of the persons, at the addresses as listed below:

(one copy) Jack Daneri, Esq.
Erie County District Attorney
Erie County Courthouse
Erie, Pa 16501

(one copy) Nicole Denise Sloane, Esq.
Erie County Public defender's Office
509 Sassafras St.
Erie, PA 16507

Both of these mailings were delivered first class-mail, from SCI-Smithfield, P.O. BOX 999, Huntingdon, PA 16652.

RESPECTFULLY SUBMITTED:

Dated: March 26, 2012

TERRANCE FOWLER
Defendant, Pro Se.
SCI-Smithfield, P.O. BOX 999
Huntingdon, PA 16652

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING IN PITTSBURGH

Office of the Prothonotary
Superior Court Of PENN.,
Suite, 600
310 Grant Street
Pittsburgh, PA 15219

March , 2012

RE: Cmmowlth. V. Fowler,
1787 WDA 2011

Dear Prothonotary:

Please find enclosed for filing, an original of Defendant's Brief In Opposition To Appellate Counsels Petition For Leave To Withdraw, and file same according to your offices practice(s) and procedure(s). Please note further, that the States Attorney and defendants counsel have both been served with a true/correct copy of the above mentioned document.

RESPECTFULLY SUBMITTED:

TERRANCE FOWLER
Defendant, Pro Se.
SCI-Smithfield, P.O. BOX 999
Huntingdon, PA 16652

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING IN PITTSBURGH

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	1787 WDA 2011
TERRANCE FOWLER, Defendant	:	

PROPOSED ORDER

AND NOW, this 26 day of March 2012, it is HEREBY **ORDERED AND DECREED**, that counsel for defendants Petition For Leave To Withdraw IS HEREBY **DENIED**, it is further **ordered**, counsel is directed to file an amended **advocates brief** in defendants behalf.

SO ORDERED.

___________________________J.
PER CURIAM